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No. 75-703

In the Supreme Court of the United States

OCTOBER TERM, 1975

ARTHUR OTTO BOWMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that Rule 404(b) of the Federal Rules of Evidence, which permits the admission in evidence of the fact of the accused's commission of other crimes, wrongs or acts, where such evidence is relevant to an issue such as motive or intent, violates the Due Process Clause of the Fifth Amendment.

Following a jury-waived trial in the United States District Court for the District of Oregon, petitioner was convicted on five counts of mail fraud, in violation of 18 U.S.C. 1341 (Pet. App. A6-A13). He was sentenced to two consecutive terms of five years' imprisonment, with the five-year sentences on each of the other three counts to run concurrently with the sentence on count 1 (Pet. App. A14-A15). The court of appeals affirmed (Pet. App. A1-A5).

1. The evidence is set forth in detail in the district court's findings of fact (Pet. App. A6-A13). Briefly, in mid-1972, petitioner arrived in Portland, Oregon, where he met Marguerite Maureen Riback (Tr. 172). Shortly thereafter they married (Tr. 173), and petitioner became active in the operation of his wife's business, Fabian's Antiques (Tr. 225). In April of 1973, petitioner began ordering jewelry for Fabian's Antiques from the Amiton Jewelry Company of New York (Tr. 9-10). From April until August of 1973, petitioner ordered numerous pieces of jewelry, which he either paid for or promptly returned (Tr. 11-16).[1]

In September and October of 1973, petitioner made four telephonic requests of Amiton, which resulted in the mailing of five packages of jewelry. These mailings formed the basis for the five counts of mail fraud on which petitioner was convicted. In each case, the items of jewelry were either not paid for or paid for with a post-dated check which was subsequently returned for lack of funds. Petitioner sold the jewelry at a loss and left Oregon without informing his wife of his departure (Tr. 16-28, 62-67, 71-75, 129-136, 181, 220).[2] The business checking account was overdrawn when petitioner left Portland (Tr. 230-231).

When petitioner was arrested in New Orleans, he possessed identification in the name of Lawrence Whalen

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[1]The district court concluded that petitioner's "intent and purpose in requesting this jewelry was to establish a course of business with Amiton which would cause them to rely on his integrity" (Pet. App. A8).

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[2]In an attempt to find out what happened to petitioner, Mrs. Bowman hired Pinkerton detectives to investigate his disappearance (Tr. 221).

(Tr. 109-110, 133) and initially denied ever having been in Oregon (Tr. 131). The next day, however, he acknowledged that he had been in Portland, and admitted obtaining the jewelry by "postdat[ing] the checks" (Tr. 135-136).

At trial, petitioner testified that he did not intend to defraud Amiton. He explained that he had left sufficient assests to cover his debts and that his sudden departure was caused by fear that the Mafia would kill him because he previously had been a government informer and had been recognized by a Mafia figure just before leaving Portland (Tr. 145-149, 157-158, 174).

2. The evidence of other crimes about which petitioner complains consisted of testimony from Edna Mitchell and Helene Parker. Edna Mitchell testified that she met petitioner in February or March of 1971, and they were wed on June 10, 1971, in Richmond, Virginia. On December 23, 1971, petitioner left Richmond after telling Mrs. Mitchell that he was going out of town on business. She neither saw him again, nor heard from him until trial. Petitioner's departure occurred after he had obtained approximately ten thousand dollars from Mrs. Mitchell; he left behind business debts of between ten and fifteen thousand dollars (Tr. 112-117).

Helene Parker testified that she met petitioner, then using the alias of Lawrence Whalen, in November of 1973, in Fort Lauderdale, Florida. Petitioner proposed marriage to Miss Parker, and a marriage license was obtained on January 2, 1974. The marriage was scheduled for the end of January, but on January 7th, petitioner told Miss Parker that he was going out of town on business. She neither saw him again, nor heard from him until trial. The approximately two thousand dollars she loaned him was never returned, since all of his checks

submitted for repayment were returned for lack of funds (Tr. 94-101).

3. Petitioner contends that the introduction of that evidence denied him due process of law. This Court has repeatedly recognized, however, that trial judges have discretion to admit evidence of other crimes where, as here, such evidence relates to events close in time to those in the case on trial and is probative of a relevant issue, such as intent or motive. See, *e.g.*, *Spencer* v. *Texas*, 385 U.S. 554, 560-562; *Sherman* v. *United States*, 356 U.S. 369, 375; *Nye & Nissen* v. *United States*, 336 U.S. 613, 618. Rule 404(b), Fed. R. Evid., is merely a codification of the existing rule which this Court previously has approved.

The evidence of petitioner's other similar crimes was directly relevant to the question whether petitioner intended to defraud Amition, which was virtually the only contested issue. The evidence was properly admitted.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1976.

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[3]Although petitioner asserts that this type of evidence weakens and shifts the government's burden of proof (Pet. 4-5), he does not explain how this evidence differs in any legally significant manner from all other relevant evidence.